



Kesis & 153 others v County Commissioner Bungoma & 6 others (Environment & Land Petition 3 of 2021) [2023] KEELC 20610 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20610 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND PETITION 3 OF 2021
EC CHERONO, J
OCTOBER 5, 2023**

BETWEEN

WANDIEMA MUTYO KESIS & 153 OTHERS PETITIONER

AND

COUNTY COMMISSIONER BUNGOMA 1ST RESPONDENT

**PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION
OF NATIONAL GOVERNMENT 2ND RESPONDENT**

LAND REGISTRAR-BUNGOMA COUNTY 3RD RESPONDENT

SURVEYOR BUNGOMA COUNTY 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

**PRINCIPAL SECRETARY MINISTRY OF LANDS AND PHYSICAL
PLANNING 6TH RESPONDENT**

KENYA FOREST SERVICE 7TH RESPONDENT

RULING

1. By a Notice of Motion application dated 19th June 2023, The Applicants/Petitioners seek the following orders;
 - a. That an order do issue directing the County Surveyor and Land Registrar to visit and establish the cut-line /Boundary between the Chebombai area (Land Parcel No. North Malakisi/ North Wamono/451 ,565, 566, & 595 among other private parcels of land) and Mt. Elgon Forest (Cheptais Forest) and file their report in Court.
 - b. Costs.



2. The application is brought under Section 13 of the ELC Act, Cap.12A Laws of Kenya, Section 3 & 3A CPA Cap. 21 Laws of Kenya, Order 51 Rule 1 CPR and Article 162(2)(b) of the Constitution of Kenya, 2010. The said application is supported by grounds apparent on the face of the application and the affidavit of Titus Wandiemu Mutio, Sworn the same date. The application is further supported by numerous annexures thereto.
3. By way of a response, the 7th Respondent through the Head of Survey and mapping at the Kenya Forest Service filed a Replying affidavit sworn on 11th July, 2023. Annexed to the said Replying affidavit is a copy of a proclamation NO.44 of 1932 and a legal Notice no. 174 of 20th May, 1974.

Applicants'/Petitioners' Summary of Facts

4. According to the Applicants/Petitioners, there is a dispute between the private land parcels at Chebembai area and Mt. Elgon Forest (Cheptais Forest). The deponent of the supporting affidavit annexed copies of Certificate of searches & Kenya Gazette Notice for North Malakisi/North Wamono/451, 565, 566 & 595. He deposed that their claim is based upon the map of 2001 while the Respondents' defence is based upon the map of 1932 and that there is need for the concerned Surveyors to visit the area and establish where the cut-line /Boundaries between the two areas is situate.
5. He deposed that no prejudice will occasion to the Respondents if the orders sought in the application is allowed.

Respondents' Summary of Facts

6. The 7th Respondent through its Head of Survey and Mapping at the Kenya Forest Service deposed that the application by the Applicants is misleading and contain false information and that the order to have the County Surveyor and the Land Registrar and Head of Survey and Mapping Kenya Forest Service to visit the site has no legal and factual basis since the respective parties have already filed their rival maps showing the boundaries of the forest.
7. The deponent also deposed that Kenya Forest Service (KFS) is not aware of any boundary demarcation done in the year 2001 and that the Gazetted Forest boundary is known as clearly described in the proclamation No. 44 of 1932 and legal Notice No. 174 of 20th May, 1974 and clearly visible on the ground. He stated that the said boundary is a natural boundary and that both maps filed by the parties can be clearly explained to the satisfaction of the court during the trial and both parties will have an opportunity to cross-examine on the rival maps and hence the visit will not alter the boundaries.
8. The deponent further deposed that the 2001 maps being relied upon by the Petitioners/Applicants were not for the adjudicated parcels of land bordering the forest since adjudication of lands neighbouring the forests was carried out during the period 1965 to 1969 and were closed in 1970 and that there have been previous incidents where staff of Kenya Forest Service lives were threatened while working in the forests where the Petitioners had illegally encroached in the year 2000.
9. In conclusion, the deponent deposed that the boundary of land parcels Number North Malakisi/North Wamomo/451, 565, 566 & 595 does not need a ground Survey but can be ascertained by just looking at the maps of the said parcel of land and in any case the Kenya Forest Service have acknowledged that they don't have a problem with the said parcels of land.

Legal Analysis and Decision.

10. I have considered the application, the affidavits, both in support and in opposition thereto as well as the annexures thereto. From the prayers in the main Petition herein, the Petitioners are seeking for



orders of inter-alia permanent injunction restraining the Respondents by themselves, their agents and whomsoever claiming under them from evicting, harassing, destroying crops, livestock and homes, an or from interfering in any manner whatsoever with the Petitioners and other Chebombai Community members' occupation and use of private land outside the cutline separating the boundary of Cheptais Forest and Chebombai area.

11. The conditions for the grant of a temporary injunction are now settled. First, an applicant must establish a prima facie case with high chances of success at the main hearing. Secondly, an applicant must demonstrate that he will suffer irreparable loss which cannot be compensated by an award of damages or costs unless the order sought in the application is granted and where the court is in doubt, the court may decide the case on a balance of convenience. Other than stating that they are registered proprietors of four parcels of land acquired sometimes in the year 2019 being Land Parcel No. North Malakisi/North Wamono/451, 565, 566 & 595, copies of which are annexed thereto, the applicants have not annexed certificates of title for all the other 149 petitioners or any empirical evidence that the said parcels of land are situate outside the cutline boundary between Cheptais Forest and Chebombai area or that proprietors of the said parcels of land have been threatened from enjoying the right to those parcels.
12. The applicants have not also produced a Gazette notice declaring the region where the purported disputed parcels are situated an Adjudication area and the establishment of partial registration and adjudication for the area of Chebombai Community where proprietors title were issued with land title deeds including land parcel Numbers North Malakisi/North Wamono/451, 565, 566 & 595.
13. The applicants have not also explained how the Respondents threatened or better still, annex any Notices or letters threatening or seeking to evict them or destroy food and cash crops from their homes situated outside the cutline. There is no evidence annexed to the supporting affidavit showing that the applicants have any proprietary interests which have been threatened by the Respondents and which require the protection by an equitable relief of injunction orders.
14. The 7th Respondent through its head of Survey and Mapping at Kenya Forest Service has deposed saying that he is not aware of any boundary demarcation done in the year 2001 and that the only known Gazetted forest boundary which is visible on the ground is described in the proclamation No.44 of 1932 and legal Notice No.174 of 20th May, 1974 which are annexed and marked EK1.
15. The test for granting of an interlocutory injunction was considered in the case of *American Cyanamid Co. v Ethicom Limited* (1975) ALL ER 504 where three elements were considered of great importance namely;
 - i. There must be a serious/fair issue to be tried;
 - ii. Damages are not an adequate remedy; and
 - iii. The balance of convenience lies in favour of granting or refusing the application.
16. In the case of *Mrao Ltd v First American Bank of Kenya and 2 Others*(2003) eKLR 125, the Court of Appeal defined a prima facie case as follows;

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”



17. From the material presented before me by way of affidavit evidence and the submissions by counsel for the Applicant, I am of the considered opinion that no right has been infringed either by the respondents or their agents and/or servants to warrant the grant of the orders sought.
18. Having found that the applicant has not established a prima facie case which is the cornerstone for the grant of an interlocutory injunctive relief, I find that it would not be necessary to consider if the other two remaining conditions for granting of orders of injunction have been met since it is mandatory that all the three conditions must be established sequentially before an order of injunction is granted.
19. The upshot of my finding is that the Notice of Motion application dated 19th June, 2023 is devoid of merit and the same is hereby dismissed with costs.
20. Orders accordingly.

READ, DATED DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 5TH OCTOBER, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Maekeri h/b for Mr. Bw'onchiri for the applicants/Petitioners
2. Respondent/advocate-absent.
3. M/S Joy C/A.

